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SUPREME COURT, U. S.

No. 295

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Respondents,

v.

RUTLAND RAILWAY CORPORATION,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 5, 1961

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OPINION BELOW

The unanimous opinion of the United States Court of Appeals for the Second Circuit on the procedural issue here involved, against which decision petitioner seeks certiorari, was entered on June 8, 1961. It is as yet unreported but is set forth as Appendix A to the petition.

The Court of Appeals declared null and void the order of the District Court of Vermont dated October 28, 1960 (Appendix C to the petition) which, without evidence or hearing on the merits, had granted a permanent injunction against the respondents and a court-appointed receiver after the District Court had removed the case from the Rutland County (Vermont) Court of Chancery. The Court of Appeals further ordered the District Court to remand the case to the Rutland County Court of Chancery.

QUESTION PRESENTED

Whether this action, which was initiated by the respondents in the Rutland County (Vermont) Court of Chancery, was properly removed to the District Court of Vermont, there being (1) no diversity of citizenship and (2) the action not being founded on a claim or right arising under the Constitution, Treaties or Laws of the United States.

STATUTE INVOLVED

The petitioner cites 28 U.S.C. §2283, the statute on Stay of State Court Proceedings. No application for such a stay was made, however; nor was one granted or denied. The case was removed to the federal court and the only applicable statute is:

> Title 28, §1441, United States Code.
> §1441. *Actions removable generally.*
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interst properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) * * *.

STATEMENT

Originally chartered by the State of Vermont, the Rutland Railway Corporation is a vital and important part of the transportation system of that State. The operation of said Railway ceased at 12:01 A.M. on September 16, 1960, because of a strike.

There is no dispute that the Railway ceased to operate as the

result of a violation of law by either Railway management or Railway labor. The question —who was the law violator —must be decided under the Federal Railway Labor Act. The question is presently pending on appeal to the United States Court of Appeals for the Second Circuit in a suit to which the respondents are, of course, not privy, that suit being solely between Railway management and labor.

One month later, on October 17, 1960, the continued violation of law had already caused such injury and was threatening to cause such further damage to the people of the State of Vermont and the State of Vermont that the respondents requested the Rutland County (Vermont) Court of Chancery to restore the status quo pending the determination of the law violator by the federal courts, or some earlier action making it possible for the management of the Railroad to resume operations. Since the determination of who was violating the law was not then a question within the jurisdiction of the State, instead of seeking an injunction, the respondents petitioned the court for a similar extraordinary remedy, a receivership.

The petition for receivership set forth the grave consequences of the shutdown to the State and its people; it informed the court of the labor dispute but did not take sides therein; and it requested the court to appoint a receiver of the state chartered Railway's property within the State to operate the Railway in the interim. Once the court had located a man in whom it had confidence for the job, it granted the petition and appointed that man the receiver.

Immediately after the Rutland County Court of Chancery had appointed the receiver, the United States District Court for Vermont removed the case from the State court and, once this had been done, issued a temporary restraining order against the court-appointed receiver. Notice of hearing was given at the same time according to the federal rules of civil procedure.

One week later on October 26, 1960, the return day, the District Court issued a permanent injunction against the receiver and the respondents from doing anything except appealing. The moving party presented no evidence in support of the injunction. The respondents had moved on jurisdictional grounds that the case be remanded, which motion was denied.

The respondents had further objected to jurisdiction of the court to issue an injunction without evidence but had been overruled.

Almost immediately after the granting of the permanent injunction against the respondents and the receiver, the Railway resumed operations. For this reason, the petitioner herein moved to dismiss as moot respondents' appeal to the United States Court of Appeals. (See motion and answering affidavit in the record before the Court of Appeals.) Because there are several steps necessary to terminate the litigation and these can only be taken before a court which has proper jurisdiction, the Court of Appeals denied the motion and argument to dismiss as moot, unanimously reversed the District Court on the jurisdictional question and ordered the case remanded to the State Court where it may properly be terminated.

The only possible purpose of the present petition is to attempt to have the final steps in terminating the litigation heard before the District Judge of the District of Vermont instead of before a chancellor in the Rutland County Court of Chancery where the suit originated and where proper jurisdiction lies

ARGUMENT

A. No Substantial Question is Presented.

The petitioner, who now claims that a substantial question is presented, moved in the United States Court of Appeals for the Second Circuit to dismiss the respondents' procedural appeal as moot on the grounds that the Railway was again operating under its own management and, therefore, by terms of the original petition for receivership, the receiver was no longer necessary. Petitioner further urged at the time of argument in the Court of Appeals that the case was unique and "one of a kind" and again urged that the court need not decide the procedural issue presented because the only matter left unresolved was the termination of the litigation.

The petitioner now requests certiorari "because of the importance of the conflicting claims to jurisdictional power asserted by a federal and state court over the subject matter of this proceeding."

The petitioner constantly asserts that the subject matter of

this litigation is a labor dispute. The first statement of "Questions Presented" (Petition for Writ of Certiorari, p. 2) and the argument on pages 7 and 8 are typical of this oft repeated false assertion. There the claim is made that the State knew or was chargeable with knowledge that the relief requested was the subject of an already pending injunction action. This simply is not true. The petition for receivership at paragraph No. 9 expressly negated a request for adjudication of the labor dispute. As the Court below stated (Petition for Writ of Certiorari, 5A):

> "* * *Vermont did not rely upon a right created by the federal statute but rather it asserted its own sovereignty."

The opinion of this Court in *Gully v. First National Bank*, 299 U.S. 109 (1936), does not support petitioner's position but is squarely against it. At page 112 of 299 U.S this Court said:

> "* * *To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action* * *"

In this case neither the Constitution of the United States nor the federal statutes are essential to plaintiffs' cause. The constitutional points were raised by the petition for removal and the case does not meet the requirement of the *Gully* opinion that "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

A unanimous Court of Appeals held that while the District Judge did have jurisdiction over the labor dispute, he did not have jurisdiction to remove from State court a claim based on the sovereignty of the State over property located in the State and owned by a resident of the State. As to such a claim, there is no substantial question as to what court has jurisdiction.

B. There Is No Conflict In Legal Decisions Concerning This Case.

The petitioner urges a conflict of decisions. To do so it juxtaposes decisions concerning the stay of State court pro-

ceedings and decisions concerning the removability of cases from State courts. As pointed out earlier, however, no request for a stay of the State court proceedings was ever made or granted.

If there had been a stay of State court proceedings in this case, the jurisdiction to terminate the affairs of the receivership would still be in State court where the Court of Appeals says it properly lies. And the case would still be in State Court. This petition for certiorari which is simply an attempt to give jurisdiction to the District Court to wind up the affairs of the receivership would then have no purpose at all.

The cases concerning stay of State court proceedings have no applicability.

The law concerning removal of actions from State courts, as applied to the facts in this case, is so clear that instead of citing a long list of cases, the Court of Appeals cited textbooks on the point. (See Appendix A to the petition, p. 4a.)

C. The Resolution Of This Petition Has No Importance Beyond The Parties Hereto.

The petitioner urged in the lower courts that the issue involved in this petition was moot and of no importance as a guide to future litigation because the case was unique. The issue herein is strictly procedural.

Other issues which the petitioner seeks to raise concern the merits of the original petition to the Vermont court by Vermont's Attorney General and the State of Vermont. These issues have never been properly raised and therefore were never briefed or argued below. Their resolution, in the first instance, properly lies in the State court, but in any event, they are not raised herein.

The sole question presented here is who has jurisdiction to terminate a moot dispute.

CONCLUSION

For foregoing reasons. the respondents pray that the petition for certiorari be denied and that the mandate of the United States Court of Appeals for the Second Circuit issue to the United States District Court for Vermont.

Respectfully submitted,
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